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# Rediscovering the Principle of Comity in English Private International Law<sup>1</sup>

Thomas Schultz and Jason Mitchenson<sup>2</sup>

**Abstract:** Academically speaking, comity is all but dead. Cold-shouldered by the literature, the principle has become known as little more than a useless relic of the past. But a review of the case law tells a very different story. Comity thrives in the judicial decisions of English courts suggesting that, in particular areas of law, comity is alive and well. In light of the disjunct between the literature and judicial practice, this article seeks to shed new light on the role of comity in English private international law. Ultimately, it seeks to unbridle comity's legal potential and reposition it as an important principle of English private international law worthy of further academic research.

**Résumé:** Académiquement, le principe de la comity, ou courtoisie internationale, est presque morte. Ignoré par la doctrine, le principe est essentiellement perçu comme une relique inutile du passé. Mais si l'on porte un regard attentif à la jurisprudence, une histoire très différente émerge. La comity prospère dans les décisions des tribunaux anglais : à tout le moins dans des domaines particuliers du droit, la comity est résolument en vie. Partant de ce contraste entre doctrine et pratique judiciaire, les auteurs cherchent à apporter un nouvel éclairage sur le rôle de la comity dans le droit international privé anglais. A partir de là, il semble possible de débrider le potentiel juridique de la comity, en le repositionnant comme un principe important du droit international privé anglais méritant une attention soutenue de la doctrine.

**Abstract:** Akademisch ist das Prinzip der Comity, oder comitas-Lehre, fast tot. Ignoriert von der akademischen Literatur wird das Prinzip im Wesentlichen als nutzloses Relikt der Vergangenheit wahrgenommen. Aber wenn man die Rechtsprechung genauer wahrnimmt, kommt eine ganz andere Geschichte ins Spiel. Die comitas-Lehre blüht reglerecht in den Entscheidungen der englischen Gerichte: zumindest in bestimmten Bereichen des Rechts ist die comitas-Lehre entschlossen am Leben. Ausgehend von diesem Gegensatz zwischen akademischer Literatur und Gerichtspraxis beleuchten die Autoren die Rolle der comitas-Lehre im englischen Internationalen Privatrecht neu. Von da an scheint es möglich, das Rechtspotential der comitas-Lehre freizusetzen und sie als wichtigen Grundsatz des englischen internationalen Privatrechts neu zu positionieren, dem die akademische Literatur anhaltende Aufmerksamkeit schenken sollte.

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## 1. Introduction

... English judges and textbook writers have frequently used the term comity of nations, ‘a phrase which is grating to the ear when it proceeds from a court of justice’. Although the term has been often used, analysis of it reveals that it has been employed in a meaningless or misleading way.<sup>3</sup>

- 1 The quote above is taken from *Cheshire, North & Fawcett*, one of the leading textbooks on the subject of English private international law.<sup>4</sup> The authors leave little room for debate, denying that comity plays a positive role in the resolution of private international law disputes or in the development and application of private international law rules more generally. If not meaningless, comity is at best misleading – masking the true means by which private international law disputes are or should be resolved.
- 2 The authors’ opposition to comity is not surprising. Appeals to comity are often met with resistance<sup>5</sup> and the academic and judicial community’s inability to adequately define comity has only exacerbated its negative perception, fuelling the contempt with which it is often viewed.<sup>6</sup> As F.A Mann put it, comity is often considered ‘one of the most ambiguous and multi-faceted conceptions in the law’ and ‘so elusive and imprecise... to render its use unhelpful and confusing’.<sup>7</sup> The result is that, academically speaking, comity is all but dead. Cold-shouldered by the literature, it has become known as little more than a useless relic of the past.
- 3 However, a review of the case law demonstrates that the lack of attention comity receives in the literature is unjustified for it thrives in judicial practice.<sup>8</sup> As one court noted only recently: ‘comity is not some empty phrase; it is the daily reality of our courts.’<sup>9</sup> In light of the disjunct between the literature and judicial practice, this article seeks to shed new light on the importance and role of comity in English private international law. Ultimately, this article

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<sup>3</sup> J. FAWCETT & J. CARRUTHERS, *Cheshire, North & Fawcett: Private International Law* (Oxford: Oxford University Press 14<sup>th</sup> edn 2008) p. 5.

<sup>4</sup> This article uses the term comity, principle of comity or concept of comity interchangeably. The concept is also known in some jurisdictions to varying degrees as *comitas gentium*, *courtoisie internationale* and *völkercourtoisie*.

<sup>5</sup> A. BRIGGS, ‘The Principle of Comity in Private International Law’ 354. *Hague Lectures* 2011, p. 87.

<sup>6</sup> Prior studies exist but this has not appeared to dispelled the general confusion surrounding the concept. For other studies, in other contexts, see A. BRIGGS, 354. *Hague Lectures* 2011; W. DODGE, ‘International Comity in American Law’ 115. *Columbia Law Review* 2015; L. COLLINS, ‘Comity in Modern Private International Law’ in J. FAWCETT, *Reform and Development of Private International Law* (Oxford: Oxford University Press 2002) p. 89; H. YNTEMA, ‘The Comity Doctrine’ 65. *Michigan Law Review* 1966; D. CHILDRESS, ‘Comity as Conflict: Resituating International Comity as Conflict of Laws’ 44. *UC Davis Law Review* 2010; J. PAUL, ‘The Transformation of International Comity’ 71. *Law and Contemporary Problems* 2007; A. WATSON, *Joseph Story and the Comity of Errors* (Athens: University of Georgia Press 1992); J. PAUL ‘Comity in International Law’ 32. *Harvard International Law Journal* 1991.

<sup>7</sup> F. MANN, *Foreign Affairs in English Courts* (Oxford: Oxford University Press 1986) p. 134-136.

<sup>8</sup> Similar remarks have been made by Lord Collins speaking from extensive experience at the Bench. See, L. COLLINS in J. FAWCETT, *Reform and Development of Private International Law*.

<sup>9</sup> *Re E (A Child)* [2014] EWHC 6 (Fam), 1 WLR 2670 [20] (Munby J).

seeks to unbridle comity's legal potential and reposition it as an important principle of private international law worthy of further academic research.

## 2. A (Brief) History of Comity

- 4 In 1648 the Treaties of Westphalia ended the Thirty Years War and in doing so consolidated the doctrine of sovereignty, helping to establish the necessary political foundations for the modern state system.<sup>10</sup> It was thought that a clear distribution of regulatory power would be the most effective means of ending the Thirty Years War and reducing the risk of something similar occurring again in the future.<sup>11</sup> Two of the central components of the doctrine of sovereignty – the principle of political self-determination and non-interference – sought to establish an international political-legal scene to achieve this aim.<sup>12</sup>
- 5 The Thirty Years War had been fuelled by an unclear overlap of political, secular and spiritual power.<sup>13</sup> It was in reaction to this that the doctrine of sovereignty emerged. At the time of negotiations, it was thought that the creation of clear-cut states, whose regulatory scope extended no further than their individual territorial boundaries, would help contribute to the maintenance of peace. But of course, the problem with the compartmentalisation of law and regulatory power is that it never truly matched the realities of social and economic life.<sup>14</sup> Whilst the law could be restricted to certain boundaries, people could not. Thus, the problem quickly became, what were we to do with international disputes that fell within the regulatory scope of more than one State. As international trade increased and multi-jurisdictional disputes became more frequent, there was a need to create a principle that facilitated international commerce without destroying the idea of sovereignty.<sup>15</sup> This is how comity was born.<sup>16</sup>
- 6 Comity was created to meet the political need to uphold the doctrine of sovereignty and the commercial and judicial need that often arise for law to move over the strict jurisdictional boundaries that exist between States. In this sense, comity was created to uphold the Westphalian Equilibrium whilst adapting it to the realities of socio-economic life by balancing relevant political, commercial and judicial needs in a manner sensitive to States and private

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<sup>10</sup> Whilst it is commonly understood that the Treaties established the modern state this is, technically speaking, incorrect. Rather the idea of sovereignty was strongly implicated in the negotiations of the Treaties. L. GROSS, 'The Peace of Westphalia' 42. *American Journal of International Law* 1949; N. SCHRIJVER, 'The Changing Nature of State Sovereignty' 70. *British Year Book of International Law* 1999; M. KOSKENNIEMI, 'The Politics of International Law' 1. *European Journal of International Law* 1990; S. BEAULAC, 'The Westphalian Legal Orthodoxy – Myth or Reality?' 2. *Journal of the History of International Law* 2000, p. 152.

<sup>11</sup> M. SHAW, *International Law* (Cambridge: Cambridge University Press 5th edn 2003) pp. 21-25.

<sup>12</sup> G. ABI-SAAB, 'Cours Général de Droit International Public' 207. *Hague Lectures* 1987 p. 48.

<sup>13</sup> S. BEAULAC, 2. *J. Hist. Int. Law* 2000, pp. 152-155; A. OSIANDER, 'Sovereignty, International Relations, and the Westphalian Myth' 55. *International Organization* 2001, p. 251.

<sup>14</sup> JAMES CRAWFORD, *The Creation of States in International Law* (Oxford: Oxford University Press 2<sup>nd</sup> edn 2007) p. 10.

<sup>15</sup> D. CHILDRESS, 44. *UC Davis Law Review* 2010, pp. 20-22; H. YNTEMA, 65. *Michigan Law Review* 1966, p. 26; L. GROSS, 42. *Am. J. Int. Law* 1949, p. 39.

<sup>16</sup> For more on the historical developments leading to the creation of comity, see T. SCHULTZ & D. HOLLOWAY, 'Les Origines de la Comity au Carrefour du Droit International Privé et du Droit International Public' 138. *Journal du Droit International* 2011, pp. 863-886 and T. SCHULTZ & D. HOLLOWAY, 'La Comity dans l'Histoire du Droit International Privé' 139. *Journal du Droit International* 2012, pp. 571-595.

litigants.<sup>17</sup> An analysis of recent case law demonstrates that comity continues to achieve this aim.

### 3. The Principle of Comity

- 7 The Supreme Court, and the House of Lords before it, has continually recognised that the United Kingdom – and the courts which form its judicial branch – observes the rules of comity.<sup>18</sup> However, as it has yet to adopt a general definition of comity precisely what this means is open to debate.<sup>19</sup> By reviewing the large number of cases that have considered the role of comity in the context of private international law, this article suggests that we can deduce an understanding of comity. Such an understanding should remove some of the confusion surrounding the concept and provide courts with guidance in the exercise of their judicial power.
- 8 The case law demonstrates that comity will be relevant in any circumstances where the application of law or the exercise of judicial power (be it domestic or foreign) has the potential to have an effect outside the jurisdictional boundaries of the State. In this context, comity is a useful legal principle courts may use to determine what effect, if any, such law or judicial power should have beyond those boundaries. Embodying the ideas of ‘recognition’ and ‘restraint’, comity enables courts to guide the development and application of their own private international law to balance and reflect in the law the political need of States to uphold sovereignty and the judicial need of private parties for law and judicial power, in certain circumstances, to have extra-jurisdictional effect. In this sense, comity is a control mechanism, a tool courts can use to shape the development and application of their own private international law to reflect an array of public and private interests.
- 9 In practice comity will be relevant in two common scenarios. The first is in circumstances where a court is, *prima facie*, permitted to apply domestic law or exercise its judicial power in an ostensibly unlimited manner, but must determine how far and to what extent would be appropriate. In such circumstances, courts may use comity to balance relevant sovereign and judicial interests to determine what effect, if any, domestic law or judicial power should have beyond the jurisdictional boundaries of the State. The question is whether and to what extent the application of domestic law or exercise of judicial power should be ‘restrained’ in the context of the case. Ordinarily, where there is a judicial need to apply domestic law or exercise

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<sup>17</sup> K. LIPSTEIN, *Principles of the Conflict of Laws, National and International* (London: Martinus Nijhoff 1981) p. 14.

<sup>18</sup> See most notably, *Agbaje v Agbaje* [2010] UKSC 13, 1 AC 628; *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43, [2010] 1 AC 90; *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153; *Lawson v Serco Ltd* (2006) UKHL 3, 1 All ER 823; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, 2 AC 883; *The Abidin Daver* [1984] AC 398 (HL); *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 (HL).

<sup>19</sup> Although, see *Re Johnson* [1903] 1 Ch 821, 829 where the court appears to implicitly accept the definition of comity expressed by the Supreme Court of the United States in *Hilton v Guyot* (1895) 159 US 113, 163-164: comity is ‘...neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.’

judicial power extra-jurisdictionally, comity will only call for restraint where it would unduly offend foreign sovereignty. Whether or not the application of domestic law or exercise of judicial power will cause offence to foreign sovereignty is a question for the court in the individual circumstances of the case, but comity assists courts to balance the relevant sovereign and judicial interests in order to make such determinations.

- 10 The second is in circumstances where a court must determine how far and to what extent it would be appropriate to allow foreign law or judicial power to have an effect within its own jurisdiction. In such circumstances, courts may use comity to conduct the same balancing exercise to determine what effect, if any, foreign law or judicial power should have within their jurisdiction. The question in these types of cases is whether, or to what extent, the application of foreign law or exercise of foreign judicial power should be 'recognised' in the context of the case. Ordinarily, where there is a judicial need for foreign law or foreign judicial power to have an effect within the jurisdiction, comity will call for 'recognition' where it would not unduly offend domestic sovereignty. Again, whether or not recognition will offend domestic sovereignty is a question for the court in the individual circumstances of the case, but comity assists courts to balance the relevant sovereign and judicial interests in order to make such determinations.
- 11 Both scenarios are really two-sides of the same coin suggesting that comity plays a more general role in determining the appropriate scope of applicable law and judicial power. In circumstances where the courts of one State seek to apply law or exercise judicial power extra-jurisdictionally, the courts of another State will be required to determine whether, or to what extent, it should be recognised within their jurisdiction. For courts seeking to apply law or exercise judicial power beyond their jurisdictional boundaries comity calls for 'self-restraint' where it would cause offence to foreign sovereignty. For courts required to determine whether, and to what extent, it would be appropriate to recognise such laws or power within their jurisdiction, comity calls for 'recognition' where there is a judicial need to do so unless it would offend domestic sovereignty. In this sense, comity allows courts to soften the strict rules of jurisdiction by acknowledging that, in certain circumstances, there is a judicial need for the law or judicial power of one State to have an effect within the jurisdiction of another.
- 12 The balance of this article seeks to support this understanding of comity by analysing four areas of law where comity is particularly prevalent. These include: (4) the interpretation of statute and international treaties; (5) the determination of jurisdiction; (6) the recognition of foreign judgments; and (7) judicial cooperation. Importantly, this article does not seek to analyse all instance of comity. Nor does it seek to provide an in-depth analysis of English private international law rules generally. Rather, its aim is much more modest – it is simply to shed new light on the importance and role of comity in English private international law. Ultimately, this article seeks to reposition comity as an important principle of English private international law worthy of further academic research.

## 4. The Interpretation of Statute and International Treaties

### 4.1. Statutory Interpretation

- 13 It is often the case that domestic legislation is drafted in ostensibly unlimited terms. Where this is the case, a literal reading of such legislation will give one the impression that Parliament sought to legislate over all persons and matters falling within the ambit of such legislation – including those persons and matters that rightfully falling within the jurisdiction of foreign States. It is of course problematic for States to exercise their power within the sovereign territory of other States. Yet, there will be circumstances where there is a judicial need for domestic legislation to have such an effect. It is perhaps no surprise then that in this context courts commonly rely on the principle of comity to determining the appropriate scope of such legislation.<sup>20</sup>
- 14 Comity gives effect to these relevant political and judicial interests in the law by forming the basis for the principle that every statute is to be interpreted, so far as its language permits, as extending no further than the territorial boundaries of the State. The courts have consistently held that this well-established cannon of statutory interpretation, referred to as the ‘assumption against extra-territoriality’, is based on comity.<sup>21</sup> In *Lawson*<sup>22</sup> Lord Hoffmann held:
- The general principle of construction is, of course, that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world. Some international crimes, like torture, are an exception. But usually such an exorbitant exercise of legislative power would be both ineffectual and contrary to the comity of nations.<sup>23</sup>
- 15 The assumption reflects the reality that, in most cases, the extra-territorial application of legislation will offend foreign sovereignty.<sup>24</sup> However, it is merely an assumption and may be

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<sup>20</sup> A. BRIGGS, 354. *Hague Lectures* 2011, p 97.

<sup>21</sup> See most notably, *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43, [2010] 1 AC 90 [10] (Lord Mance, with whom Lord Scott, Lord Rodger, Lord Walker & Lord Brown agreed); *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260 [78]–[80] (Lord Millett); *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 (HL); Also see, *Al Sabah v Grupo Torras SA* [2005] UKPC 1, 2 AC 333; *Attorney General of Alberta v Huggard Assets Ltd* [1953] AC 420 (PC) and *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

<sup>22</sup> *Lawson v Serco Ltd* (2006) UKHL 3, 1 All ER 823 (Lord Hoffmann, with whom Lord Woolf, Lord Roger, Lord Walker & Baroness Hale agreed).

<sup>23</sup> *ibid* [6] (Lord Hoffmann, with whom Lord Woolf, Lord Roger, Lord Walker & Baroness Hale agreed).

<sup>24</sup> *Perry and Others v Serious Organised Crime Agency* [2011] EWCA Civ 578, 1 WLR 2817, [157] (Hooper LJ): ‘If a legislature seeks to go beyond the basic function of government and legislate for foreigners outside its territory it is likely to displease other nations, whose function it is usurping... Unless Parliament has conferred on the court that power in language which is unmistakeable, the court is not to assume that Parliament intended to do that which might seriously affect foreigners who are not resident here and might give offence to foreign governments... [T]wo concepts lie behind this rule, namely international comity and the concept that Parliament does not legislate where it has no effective power of enforcement.’ Also see, *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [45] (Lord Roger): ‘It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people...’ The decision was effectively overruled by the European Court of Human Rights in *Al-Skeini v United Kingdom* (App No 55721/07, 7 July 2011) 147 ILR 181 yet the House of Lords comments as to the role of comity remain sound.

displaced where there are significant judicial reasons why legislation should be read extra-territorially and where it would not offend foreign sovereignty.

- 16 Consider the particularly instructive case of *Masri (No 4)*<sup>25</sup> where the House of Lords was required to determine the scope of Civil Procedure Rule 71. Lord Mance, giving the judgment of the House, held that the wording of Civil Procedure Rule 71 did not contain any jurisdictional limitations and, on a literal reading, empowered courts to order company officers who resided outside the jurisdiction to attend a domestic court for examination.
- 17 Noting the dictates of comity, his Lordship held that there would need to be significant judicial reasons to displace the assumption against extra-territoriality.<sup>26</sup> Ultimately, his Lordship held that the claimant could not present such reasons.<sup>27</sup> Conceding that the officer in question was likely able to shed light on many of the issues before the court, his Lordship held that an order summoning a person residing in a foreign jurisdiction would likely be perceived by foreign States as offending their sovereignty because it is a direct exercise of domestic judicial power within their jurisdiction. His Lordship held that ‘eyebrows might be raised’ at the notion that Parliament had given the courts jurisdiction to summon anyone in the world to be examined in the context of Civil Procedure Rule 71.<sup>28</sup>
- 18 Lord Mance noted that the result may have been different had there been greater judicial reasons to grant the order. His Lordship gave the example of a case where examination was to be conducted for the purpose of public interest and the officer had fled the jurisdiction to escape liability.<sup>29</sup> However, he held that making such an order would be very different to the order sought in the present case which would have required the mandatory attendance of someone abroad with no personal connection with the jurisdiction.<sup>30</sup> Whilst the former may be permitted in the circumstances of the case, the latter would breach foreign sovereignty.

#### 4.2. The Interpretation of International Treaties

- 19 States generally enter into treaties to develop transnational solutions to transnational problems.<sup>31</sup> It follows then that there are significant judicial reasons why treaties should be interpreted in a transnationally consistent manner. In this context, comity plays a key role in the interpretation of international treaties by placing restrictions on the court’s interpretive process in an effort to support the transnationally consistent interpretation of such instruments.

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<sup>25</sup> *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43, [2010] 1 AC 90.

<sup>26</sup> *ibid* [10]-[16] (Lord Mance, with whom Lord Scott, Lord Rodger, Lord Walker & Lord Brown agreed).

<sup>27</sup> *ibid* [26] (Lord Mance, with whom Lord Scott, Lord Rodger, Lord Walker & Lord Brown agreed).

<sup>28</sup> *ibid* [24]-[26] (Lord Mance, with whom Lord Scott, Lord Rodger, Lord Walker & Lord Brown agreed).

<sup>29</sup> *ibid* [20] (Lord Mance, with whom Lord Scott, Lord Rodger, Lord Walker & Lord Brown agreed). His Lordship gave the example of *Re Seagull Manufacturing Co Ltd* [1993] Ch 345 (CA).

<sup>30</sup> *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43, [2010] 1 AC 90 [22] (Lord Mance, with whom Lord Scott, Lord Rodger, Lord Walker & Lord Brown agreed).

<sup>31</sup> *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, 2 AC 628 [12] (Lord Steyn); *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 AC 495 [1] (Lord Scott).



In *Morris*,<sup>32</sup> the House of Lords highlighted the importance of comity in this context holding that, in the interpretation of international treaties, comity requires that consideration be given to international case law to achieve the aim of transnational consistency. Lord Hope held:

In an ideal world the Convention should be accorded the same meaning by all who are party to it... Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions...<sup>33</sup>

- 20 In *Morris*, Lord Mackay attached critical importance to two decisions of the Supreme Court of the United States, ultimately holding that they evidenced an international consensus as to the proper interpretation of the *Warsaw Convention*. His Lordship held that, were it not for those decisions, he would have given more weight to the argument for a contrary interpretation.<sup>34</sup> Lord Hope agreed attaching similar importance to previous decisions in the United States, Australia and Israel.<sup>35</sup>
- 21 It is self-evidently desirable that international treaties be construed in a uniform manner. Comity supports this judicial aim by requiring that courts recognise and give due regard to the decisions of foreign courts. It is only by virtue of comity that English courts extend recognition to foreign decisions for this purpose. Of course, comity does not demand that courts blindly follow international consensus – to do so would unduly constrain domestic sovereignty. But it does require that they give due recognition to foreign decisions in order to achieve the aim of transnational consistency.<sup>36</sup> By doing so, courts are able to reconcile the political need to uphold their domestic sovereignty with the judicial need to develop consistent transnational law.

## 5. The Determination of Jurisdiction

### 5.1. Adjudicating on the Laws and Acts of Foreign States

- 22 There are few exercises of judicial power more likely to offend foreign sovereignty than for the courts to pass judgment on the laws and acts of foreign States. Comity reflect this position in the law by placing significant restrictions on the exercise of judicial power where courts are asked to do so. In this context, comity has shaped the development of two separate but intertwined doctrines of law: (1) the act of state doctrine; and (2) the doctrine of non-justiciability.<sup>37</sup> Whilst the former operates in respect of the legislative and executive acts of foreign States within their territory,<sup>38</sup> the later operates in respect of the legislative and

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<sup>32</sup> *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, 2 AC 628.

<sup>33</sup> *ibid* [81] (Lord Hope).

<sup>34</sup> *ibid* [7] (Lord Mackay).

<sup>35</sup> *ibid* [107]-[120] (Lord Hope).

<sup>36</sup> See also, *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 AC 495; *Barclay v British Airways Plc* [2008] EWCA Civ 1419, [2010] QB 187.

<sup>37</sup> These doctrines may be broken down even further and apply differently in different contexts. For a comprehensive discussion of the law in this area see, most notably, the Supreme Court's recent decision in *Belhaj & Rahmatullah (No 1) v Straw & Ors* [2017] UKSC 3.

<sup>38</sup> See, *A M Luther v James Sagor & Co* [1921] 3 KB 532 (CA) where the Court of Appeal held that an attempt in England by former owners to reclaim goods confiscated in Russia by the Soviet Government was not

executive acts of foreign States internationally.<sup>39</sup> Both doctrines restrain courts from passing judgment on the laws and acts of foreign States. However, neither serves as a complete bar recognising that in ‘exceptional circumstances’ it may be appropriate.<sup>40</sup>

- 23 The act of state doctrine is a longstanding doctrine of Anglo-American jurisprudence.<sup>41</sup> In *Buck v Attorney General*<sup>42</sup> Diplock LJ held:

As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity... For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do.<sup>43</sup>

- 24 Twenty-five years later, the House of Lords referred to a related principle - the doctrine of ‘non-justiciability’.<sup>44</sup> Deriving from the same line of cases as the act of state doctrine, the House held that under the doctrine of non-justiciability courts may not adjudicate upon acts of foreign States on the international plane, even in an action between private parties, because they touch on State sovereignty.<sup>45</sup>
- 25 Summarising the two doctrines, Lord Wilberforce held in *Buttes Gas and Oil*<sup>46</sup> that they exist in such restrictive forms because they derive from the common principle of comity.<sup>47</sup> In this context, comity reflects the political need to respect sovereignty by heavily favouring non-adjudication. Passing judgment on the acts of foreign States is so likely to cause offence to foreign sovereignty that both doctrines will apply even where there are significant judicial reasons to do so. However, again, comity does not pose a complete bar to adjudication, recognising that there will be ‘exceptional circumstances’ where it is appropriate. The case law demonstrates that the only real exception to these doctrines is where foreign laws or acts contravene international law, human rights or public policy.

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permissible because the acts of state occurred within the State’s jurisdiction and could therefore not be questioned by English Courts.

<sup>39</sup> See, *Buttes Gas and Oil Co v Hammer* [1982] AC 888 (HL) where the House of Lords held it would not determine a dispute involving two oil companies operating in an area of contested sovereignty because resolution of the dispute would require that the court determine the boundaries of sovereign States.

<sup>40</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, 2 AC 883; *Buttes Gas and Oil Co v Hammer* [1982] AC 888 (HL); *Belhaj v Straw* [2014] EWCA Civ 1394, [2015] 2 WLR 1105; *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458.

<sup>41</sup> *Blad v Bamfield* (1674) 36 ER 992, 3 Swans 604, 607 (Lord Nottingham); *Duke of Brunswick v King of Hanover* (1848) 9 ER 993, 2 HL Cas 1, 17 (Lord Cottenham). See also, *A M Luther v James Sagor & Co* [1921] 3 KB 532 (CA) and *Princess Paley Olga v Weisz* [1929] 1 KB 718 (CA) citing the United States cases of *Underhill v Hernandez* (1897) 168 US 250 and *Oetjen v Central Leather Co* (1918) 246 US 297 as expressing the modern conception of the act of state doctrine.

<sup>42</sup> *Buck v Attorney General* [1965] Ch 745 (CA).

<sup>43</sup> *ibid* 770 (Diplock LJ).

<sup>44</sup> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL) 499 (Lord Oliver, with whom Lord Keith & Lord Brandon agreed).

<sup>45</sup> *ibid* 499-500 (Lord Oliver, with whom Lord Keith & Lord Brandon agreed) citing earlier expression of the doctrine in *Cook v Sprigg* [1899] AC 572 (PC) and *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 12 ER 388, 7 Moo Ind App 476 (PC).

<sup>46</sup> *Buttes Gas and Oil Co v Hammer* [1982] AC 888 (HL).

<sup>47</sup> *ibid* 932 (Lord Wilberforce, with whom Lord Fraser, Lord Russell, Lord Keith & Lord Bridge agreed).

- 26 A particularly instructive example of comity's role in this area is the House of Lords' decision in *Kuwait Airways (Nos 4 and 5)*<sup>48</sup> where it held that the act of state doctrine was excluded by an exception founded in international law or public policy. Lord Hope held:

It is clear that very narrow limits must be placed on any exception to the act of state rule... These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated.<sup>49</sup>

- 27 Thus, comity demands restraint, restraint of the greatest kind. But it does not require abstention, recognising that in exceptional circumstances it will be judicially necessary to exercise adjudicatory power. A similar decision was handed down more recently by the Supreme Court in *Belhaj*<sup>50</sup> which concerned grave allegations of human rights and international law violations. In that case, Lord Neuberger, on behalf of the majority, held that the acts alleged would never have been covered by the act of state doctrine. But, if they had, the act of state doctrine would not have applied because it is subject to a public policy exception. In his discussion of the doctrine's scope, his Lordship held that 'any treatment which amounts to a breach of *jus cogens* or preemptory norms would almost always fall within the public policy exception.'<sup>51</sup>

- 28 The act of state doctrine does not however extend to foreign judicial acts. However, the case law demonstrates that comity continues to be relevant. In *Altimo Holdings*<sup>52</sup> the Privy Council held:

Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required.<sup>53</sup>

The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence...<sup>54</sup>

- 29 In this sense comity forms the basis for a presumption that courts will not adjudicate on foreign judicial acts unless there are significant judicial reasons why they should. The presumption

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<sup>48</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, 2 AC 883.

<sup>49</sup> *ibid* [137]-[140] (Lord Hope). See also, *Oppenheimer v Cattermole* [1976] AC 249 (HL) where the House of Lords held that, although nationality falls within the regulatory scope of individual States, it would not recognise decrees of the Nazi Government which deprived Jewish immigrants of their German nationality and confiscated their property. Lord Cross (227-228) held: 'A judge should, of course, be very slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction... but what we are concerned with here is legislation that takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.'

<sup>50</sup> *Belhaj & Rahmatullah (No 1) v Straw & Ors* [2017] UKSC 3.

<sup>51</sup> *Ibid* [168] (Lord Lord Neuberger, with whom Lord Wilson, Lady Hale & Lord Clarke agreed).

<sup>52</sup> *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804. Also see, *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458.

<sup>53</sup> *ibid* [97] (Collins SCJ, judgment of the Privy Council).

<sup>54</sup> *ibid* [101] (Collins SCJ, judgment of the Privy Council).

may only be displaced where there is cogent evidence that there is a real risk that justice will not be obtained in the foreign court. However, in the absence of such evidence, comity demands that courts start with the working assumption that all foreign courts can and seek to do justice.<sup>55</sup>

- 30 In the *Yukos* case,<sup>56</sup> the Court of Appeal explained why comity's role differs in cases concerning foreign legislative and executive act and in cases concerning foreign judicial acts. The Court noted that legislative and executive acts are on their own plane – internationally States are responsible only under international law. Courts however are always responsible for their acts – internationally they are responsible to other courts in the sense that their judgments must be capable of being recognised. The result is that where foreign judicial acts are being relied on in domestic proceedings, domestic courts will be permitted to review such acts where there is cogent evidence that they are contrary to the rule of law.<sup>57</sup>
- 31 It is not that foreign judicial acts are less deserving of respect. Rather, it is that the examination of foreign judicial conduct in these types of cases arises before the courts where it is being relied on to assert a domestic legal right. The question of whether that right exists is within the jurisdiction of domestic courts. If comity precluded courts from conducting an examination of foreign judicial conduct in such circumstances it would inappropriately place respect for foreign sovereignty above domestic sovereignty. The case law demonstrates that courts consider the appropriate balance to be that they proceed with extreme caution - only passing judgement where there is cogent evidence capable of displacing the presumption that the foreign court has acted in accordance with the rule of law.<sup>58</sup>

## ***5.2. The Exercise of Judicial Powers that Effect Foreign Judicial Process***

- 32 Comity also plays a key role in guiding the exercise of judicial power where a court is asked to make an order that would conflict with or undermine the laws of a foreign State or a pre-existing order of its courts. In circumstances where a court is asked to make such an order comity favours restriction of the power. However, once again, it will not act as a complete bar but rather requires that courts be 'very slow' to make such orders.<sup>59</sup> More recent case law

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<sup>55</sup> *ibid*; *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458; *Al-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123, [2006] CP Rep 47; *Cherney v Deripaska* [2008] EWHC 1530, [2009] 1 All ER (Comm) 333.

<sup>56</sup> *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458.

<sup>57</sup> *ibid* [87] (Rix LJ, judgment of the Court).

<sup>58</sup> *ibid* [87]-[91] (Rix LJ, judgment of the Court).

<sup>59</sup> *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 (CA) 304 (Scrutton LJ): 'This country should not in my opinion assist or sanction the breach of the laws of other independent States.'; *Al Habtoor v Fotherington* [2001] EWCA Civ 186, 1 FLR 951 [44] (Thorpe LJ with whom Laws and Penry-Davey LJ agreed): 'In my opinion the courts of this jurisdiction should be very slow to make orders that directly conflict with pre-existing orders in any friendly foreign state. The principle of comity requires no less.' Also see, *Mercredi v Chaffe* [2011] EWCA Civ 272, 2 FLR 515; *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 (HL); *Foster v Driscoll* [1929] 1 KB 470 (CA).

demonstrates that in certain cases comity goes even further obliging courts to actively support foreign proceedings.<sup>60</sup>

- 33 In this areas of law there are two particular judicial orders commonly associated with comity: (1) the anti-suit injunction; and (2) the order of *forum non conveniens*. An anti-suit injunction is an *in personam* judicial order aimed at restraining a party from commencing or continuing proceedings in a foreign court for ‘reasons of justice’.<sup>61</sup> The courts have, on a number of occasions, stressed the *in personam* nature of anti-suit injunctions in an attempt to ease foreign sovereign concerns – particularly in the European Union. The argument is that, if anti-suit injunctions act to restrain parties, rather than foreign courts, they should not be considered offensive to foreign sovereignty.<sup>62</sup> However, in more recent cases, the courts have acknowledged that anti-suit injunctions indirectly interfere with foreign courts – effectively restraining them from determining their own jurisdiction by precluding parties from commencing or continuing proceedings.<sup>63</sup>
- 34 The question as to comity’s role in this area becomes all the more complex because of the United Kingdom’s participation in the European Union and its recent vote to leave. As a member State, courts of the United Kingdom are obliged to apply European regulations and are subject to decisions of the European Court of Justice (ECJ). In the context of anti-suit injunctions this had led to different practices emerging between English courts vis-à-vis other member States, and English courts vis-à-vis non-member States.
- 35 With the obvious exception of the United Kingdom, most member States consider anti-suit injunctions to unacceptably infringe sovereignty. This position is reflected in the Brussels Regime<sup>64</sup> which resolves jurisdictional conflicts by application of the civil law rule of *lis*

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<sup>60</sup> See Section 7 (Judicial Cooperation). See also, *Mercredi v Chaffe* [2011] EWCA Civ 272, 2 FLR 515 [63] (Thorpe LJ): ‘as a matter of comity and the collaboration of courts within the European Union the London judge had an obligation to support the proper conclusions of the French court or, at the least, not to enter into a litigation strategy to undermine the order...’

<sup>61</sup> *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL) 124 (Lord Goff, with whom Lord Slynn, Lord Steyn, Lord Clyde & Lord Hutton agreed).

<sup>62</sup> *Turner v Grovit* [2001] UKHL 65, [2002] 1 WLR 107 [26] (Lord Hobhouse, with whom Lord Nicholls & Lord Hoffmann agreed): ‘The making of a restraining order does not depend upon denying, or pre-empting, the jurisdiction of the foreign court... Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions.’ Also see, more recently, *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 811, 2 All ER (Comm) 234, 144 (Blair J): ‘An order of this kind is made in personam against a party subject to the court’s jurisdiction by way of requiring compliance with agreed terms. It does not purport to have direct effect on the proceedings in the [foreign State]. This court respects such proceedings as a matter of judicial comity.’

<sup>63</sup> *Turner v Grovit* [2001] UKHL 65, [2002] 1 WLR 107 [28] (Lord Hobhouse, with whom Lord Nicholls & Lord Hoffmann agreed): ‘Similarly, English law attaches a high importance to international comity and the English court has in mind how the restraining order will be perceived by foreign courts... It is recognised that to make an order against a person who is a party to proceedings before a foreign court, may be treated as an interference (albeit indirect) in the foreign proceedings.’ See also, *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL) 138 (Lord Goff, with whom Lord Slynn, Lord Steyn, Lord Clyde & Lord Hutton agreed).

<sup>64</sup> On 10 January 2015 *EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Recast)* entered into force. In doing so, it replaced previous iterations of the Brussels Regime, including *EU Regulation 44/2001 (Brussels Regulation)* and the original 1968 *Brussels Convention* (collectively, the **Brussels Regime**).

*pendens*.<sup>65</sup> In *Turner*, the ECJ outlawed the use of anti-suit injunctions between member States on the basis that it undermines the jurisdictional rules of the Brussels Regime and breaches member State sovereignty.<sup>66</sup> However, anti-suit injunctions are still available to courts where the competing jurisdiction is not a member State.<sup>67</sup> In such circumstances, comity plays a key role in guiding the appropriate exercise of the power to grant such orders. The case law demonstrates that comity requires courts to exercise a ‘great level of caution’ when contemplating an anti-suit injunction and that they be granted only in ‘exceptional cases’.<sup>68</sup>

- 36 The future of the anti-suit injunction is difficult to predict. Arguably, they will continue to be available to courts where the competing jurisdiction is not a member State. However, the United Kingdom’s recent vote to leave the European Union means that, in the not too distant future, English courts may no longer be bound by the Brussels Regime or decision of the ECJ.<sup>69</sup> The result may be that anti-suit injunctions become available even where the competing jurisdiction is a member State.
- 37 Comity dictates that courts must have personal jurisdiction over the person subject of the anti-suit injunction<sup>70</sup> and that the domestic forum have a sufficient connection with the matter.<sup>71</sup> Where there are two or more available forums for trial, comity requires that the domestic forum be the natural forum before an anti-suit injunction be granted.<sup>72</sup> Where there is little connection

<sup>65</sup> Article 31(1) of the Brussels Recast provides that ‘where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.’

<sup>66</sup> *Turner v Grovit* [2005] 1 ECR 3565 (C-159/02) 24-27, 31.

<sup>67</sup> See recently, *Petter v EMC Europe Ltd, EMC Corporation* [2015] EWHC 1498 (QB) [68]-[69] (Cooke LJ): ‘The ECJ’s ruling in *Turner v Grovit* [2004] 1 ECR 3565 (C-159/02) held that anti-suit injunctions had no part to play in the scheme of the Regulation... I consider that the grant of anti-suit injunctions is essentially inimical to the Regulation which certainly does not allow such in the context of jurisdictional disputes where the jurisdictions in question are the courts of Member States. Common Law jurisdiction may grant anti-suit injunctions outside the context of the Recast Regulation.’ See also, *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2006] 1 All ER (Comm) 32.

<sup>68</sup> *Turner v Grovit* [2001] UKHL 65, [2002] 1 WLR 107; *Donohue v Armco* [2001] UKHL 64, [2002] 1 All ER 749; *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL); *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC); *OceanConnect UK Ltd v Angara Maritime Ltd* [2010] EWCA Civ 1050, [2011] 1 All ER (Comm) 193; *Deutsche Bank AG v Highland Crusader Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023; *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 625, [2009] QB 503; *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, 2 All ER (Comm) 813; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd* [2004] EWCA Civ 1598, [2005] 1 All ER (Comm) 715.

<sup>69</sup> The Brussels Regime is part of the law of the United Kingdom and thus the vote to leave is not sufficient to change current practice. The Brussels Regime would only cease to be binding if Parliament withdrew from the European Union Treaty and domestic legislation that gives it effect.

<sup>70</sup> *Deutsche Bank AG v Highland Crusader Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023 [50] (Toulson LJ, with whom Goldring & Carnwath LJ agreed); *Glencore International AG v Metro Trading International Inc (No 3)* [2002] EWCA Civ 528, 2 All ER (Comm) [42] (Rix LJ, with whom Walker & Morritt LJ agreed).

<sup>71</sup> *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL) 138 (Lord Goff, with whom Lord Slynn, Lord Steyn, Lord Clyde & Lord Hutton agreed): ‘As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction, in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with a foreign court which an anti-suit injunction entails.’

<sup>72</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL); *Connelly v RTZ Corporation Plc* [1998] AC 854 (HL); *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran* [1994] 1 AC 438 (HL); *Lubbe v Cape Plc* [2000] 1 WLR 1545 (HL); *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC).

with the domestic forum granting an anti-suit injunction may be perceived by the foreign State as a breach of their sovereignty, particularly if that foreign State has a comparatively stronger connection with the matter.<sup>73</sup>

38 Once the necessary connection with the forum has been established, it has to be demonstrated that ‘the ends of justice’ require an anti-suit injunction.<sup>74</sup> In other words, comity requires that there be significant judicial reasons for the anti-suit injunction. Generally speaking, this may be satisfied where foreign proceedings are vexatious or oppressive,<sup>75</sup> unconscionable,<sup>76</sup> in breach of an exclusive jurisdiction or arbitration clause<sup>77</sup> or against public policy.<sup>78</sup> Even where there is a sufficient connection with the domestic forum, and there are significant judicial reasons why an anti-suit injunction should be granted, it does not follow that an anti-suit injunction should automatically be granted. Comity will continue to favour restriction of the judicial power because anti-suit injunctions, by their very nature, interfere with the judicial process of foreign courts. Comity therefore demands the court ask itself the additional question whether granting an anti-suit injunction would unacceptably infringe foreign sovereignty. In asking this question, comity requires that courts recognise that foreign courts may not necessarily determine the strength of their connection with the matter in the same way domestic courts do.<sup>79</sup>

39 A particularly instructive example of the role of comity in this area is the Court of Appeal’s decision in *Bloom*.<sup>80</sup> In that case, creditors of an English company, which had entered into administration pursuant to an English court order, started proceedings in the United States for sums allegedly due from the company and obtained ex parte attachment orders against the company’s assets. The creditors deliberately failed to inform the English administrators of the foreign proceedings. Unaware, the administrators paid sums of money to a post-administration supplier to the company, which went to the supplier’s account in New York where it became subject to attachment. The administrators applied to an English court for an anti-suit injunction restraining the creditors from taking any steps in the United States proceedings to seek a

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<sup>73</sup> *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL) 138 (Lord Goff, with whom Lord Slynn, Lord Steyn, Lord Clyde & Lord Hutton agreed); *British Airways Board v Laker Airways Ltd* [1985] AC 58 (HL); *Deutsche Bank AG v Highland Crusader Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023.

<sup>74</sup> *Glencore International AG v Metro Trading International Inc (No 3)* [2002] EWCA Civ 528, 2 All ER (Comm) 42 (Rix LJ, with whom Walker & Morritt LJJs agreed); *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC).

<sup>75</sup> *Turner v Grovit* [2001] UKHL 65, [2002] 1 WLR 107; *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL); *Glencore International AG v Metro Trading International Inc (No 3)* [2002] EWCA Civ 528, 2 All ER (Comm); *Sabah Shipyard (Pakistan) Ltd v Pakistan* [2002] EWCA Civ 1643, 2 Lloyd’s Rep 571.

<sup>76</sup> *South Carolina Insurance Co v Assurantie Maatschappij de Zeven Provinciën NV* [1987] AC 24 (HL); *Barclays Bank Plc v Homan* [1992] BCC 757 (CA); *Midland Bank Plc v Laker Airways Ltd* [1986] QB 689 (CA).

<sup>77</sup> *Donohue v Armco* [2001] UKHL 64, [2002] 1 All ER 749; *Deutsche Bank AG v Highland Crusader Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023; *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2006] 1 All ER (Comm) 32.

<sup>78</sup> *Barclays Bank Plc v Homan* [1992] BCC 757 (CA); *Stichting Shell Pensioenfonds v Kryss* [2014] UKPC 41, [2015] AC 616.

<sup>79</sup> *Deutsche Bank AG v Highland Crusader Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023 [50] (Toulson LJ, with whom Goldring & Carnwath LJJs agreed).

<sup>80</sup> *Bloom v Harms Offshore GmbH & Co* [2009] EWCA Civ 632, [2010] Ch 187.

judgment in favour of their monetary claims. Upholding the decision to grant an anti-suit injunction, the Court of Appeal held:

The comity owed by the courts of different jurisdictions to each other will normally make it inappropriate for the court to grant injunctive relief affecting procedures in a court of foreign jurisdiction. In this particular case, this court recognises that the [United States] bankruptcy and district courts are experienced in commercial and insolvency matters. Nonetheless, the conduct of the creditor against whom an injunction is sought, and the circumstances of the attachment of the property of the company, may justify the grant of an injunction despite the strong presumption that this court will not interfere with the proceedings of a foreign court.<sup>81</sup>

- 40 Conducting a comity-based analysis, Burton LJ, on behalf of the Court, highlighted the factors he considered relevant in upholding the anti-suit injunction. Determining the strength of the connection with the domestic forum, his Lordship noted that the company was incorporated and had its place of business in England, neither the company nor its creditors carried on business in the United States and the company was in administration under English court orders. Conversely, the creditors had no real connection with the United States – they commenced proceedings simply to subvert the English court orders. Reviewing the judicial reasons in favour of granting the anti-suit injunction his Lordship held that the creditors had purposely failed to inform the United States Court that the company was in administration in England and had mislead the United States Court to gain a better position. The attachments did not fasten on any pre-administration property in New York but rather their success depended on property coming into the United States Court’s jurisdiction during administration. Burton LJ concluded that the conduct was unconscionable and thus upheld the anti-suit injunction.<sup>82</sup>
- 41 Comity has also played a key role in the development of the doctrine of *forum non conveniens* which permits courts to decline jurisdiction where a matter would more appropriately be resolved by a foreign court.<sup>83</sup> The doctrine is one of the most commonly recognised expressions of comity demonstrating respect for foreign sovereignty by deference of judgment. Like anti-suit injunctions, the Brussels Regime has altered the common law. However, the new Brussels Recast regulates grants of stays in general effectively superseding the position at common law.
- 42 Despite this, it is important to review the case law surrounding the doctrine of *forum non conveniens* for three reasons. First, it enables us to develop a more informed understanding of comity in judicial practice. Second, much of the case law in this area may provide significant guidance in the application of the limited *forum non conveniens* principle recently introduced in the new Brussels Recast. And third, as the United Kingdom has recently voted to leave the European Union, courts may, in the not too distant future, revert back to the common law position.

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<sup>81</sup> *ibid* [27] (Burton LJ, with whom Chadwick & Ward LJJ agreed).

<sup>82</sup> *ibid* [27]-[30] (Burton LJ, with whom Chadwick & Ward LJJ agreed).

<sup>83</sup> *The Abidin Daver* [1984] AC 398 (HL); *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).



43 The doctrine of *forum non conveniens* is deeply rooted in the principle of comity.<sup>84</sup> In *Abidin Daver* Lord Diplock noted that the introduction of the doctrine marked an essential change in judicial attitude towards foreign courts – in his words, a move from ‘judicial chauvinism’ to ‘judicial comity.’<sup>85</sup> Under the doctrine:

... a national court may decline to exercise jurisdiction on the ground that a court in another State, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interest of all the parties and the ends of justice.<sup>86</sup>

44 Similar to the law surrounding anti-suit injunctions, comity demands that courts focus on the comparative ‘connecting factors’ between the matter and the competing jurisdictions. If jurisdiction is a matter of right in the domestic forum, a stay may only be granted where there is another forum ‘clearly or distinctly more appropriate’. If no other available forum is ‘clearly or distinctly more appropriate’ the court will ordinarily refuse to grant a stay. However, if there is the court ordinarily will grant a stay unless there are reasons of justice which require that a stay be refused.<sup>87</sup>

45 The factors to be taken into account in making this determination necessarily go to the relevant sovereign and judicial interests at play. Often these interests will point in the same direction. It is obviously judicially desirable that matters be heard in the most appropriate forum. Generally, that forum which has the strongest connection will also be the forum most capable of doing justice to the parties. Further, it is generally in sovereign interests that courts hear matters with which they have the strongest connection. The doctrine of *forum non conveniens* permits courts to reconcile these interests by deferring judgment to foreign courts that have a stronger connection with the matter.

46 Take for example the particularly instructive case of *Re Harrods (Buenos Aires) Ltd*<sup>88</sup> where the Court of Appeal held that the primary judge should have granted a stay in favour of Argentinian proceedings. Of particular note is the judgment of Bingham LJ who conducted a comprehensive comity-based analysis:

It is common ground that the factors connecting this action with the Argentine forum are strong and obvious. All the economic, logistical and management considerations which loom large in any substantial action point strongly towards Argentina. The company carried on business, and the acts complained of were done, there not here. The witnesses are there, not here, and in the main speak Spanish, not English, a significant matter in an action where credibility is very much in issue. The documents and records are there, not here, and are in Spanish, not English. The court there would bring to the evaluation of factual evidence a familiarity with local conditions which a court here would necessarily lack. Expert evidence would be needed here which would not be needed there. The court there would be much better placed to assess the significance of related proceedings which have already

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<sup>84</sup> *The Abidin Daver* [1984] AC 398 (HL).

<sup>85</sup> *ibid* 411 (Lord Diplock).

<sup>86</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) 476 (Lord Goff, with whom Lord Keith, Lord Templeman, Lord Griffiths & Lord Mackay agreed). See also *Sim v Robinow* (1892) 19 R (Ct of Sess) 665, 668 (Lord Kinnear).

<sup>87</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) 475-478 (Lord Goff, with whom Lord Keith, Lord Templeman, Lord Griffiths & Lord Mackay agreed); *The Abidin Daver* [1984] AC 398 (HL) 415-416 (Lord Keith).

<sup>88</sup> *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72 (CA).

taken place there. While an English court called on to try this case would no doubt do so as best it could, the difficulties would in my view be such as to make the reliability of the outcome problematical.

The factor which is relied on as connecting this action with England is the incorporation of the company here... [However] where nothing appears to turn on the details of the company's constitution, the ultra vires rule being apparently the same in both jurisdictions, these considerations seem to me to deprive the company's English incorporation of almost all the force it might otherwise have.<sup>89</sup>

- 47 Engaging in this balancing exercise his Lordship was able to weigh all relevant sovereign and judicial interests. In particular, he noted that there were significant judicial reasons why the matter should be heard in Argentina and that these same factors lead to its sovereign connection. Likewise, despite noting that the company was incorporated in England, the fact that the case did not turn on the matter, meant that it was a comparatively weak connecting factor.
- 48 Under the new Brussels Recast, stays on grounds of *forum non conveniens* continue to be outlawed between member States. However, a new limited *forum non conveniens* principle has been introduced that allows member State courts to defer to non-member State courts if satisfied that a stay is 'necessary for the proper administration of justice'.<sup>90</sup> Recital 24 states that when making this determination courts should assess all the circumstances of the case, including but not limited to, the connection between the facts and the parties to the non-member State, the stage of the proceedings in the non-member State and whether or not the non-member State court is expected to give the judgment within a reasonable time.
- 49 This new provision provides courts with the discretion to stay proceedings based on interests of justice – not dissimilar to the doctrine of *forum non conveniens* at common law. Likewise, the criteria in Recital 24 is very similar to the 'connecting factors' and 'interests of justice' used by domestic courts in their application of the doctrine. Whilst the new Brussels Recast has adopted a different test for granting stays, the case law analysed above may be relevant in determining whether a stay is 'necessary for the proper administration of justice'. Arguably, the wealth of case law balancing sovereign and judicial interests may be particularly valuable for civil law member State courts who have not traditionally had the ability to grant stays on grounds of *forum non conveniens*.

## 6. The Recognition of Foreign Judgments

- 50 As States may only enforce their laws and acts within their jurisdictional boundaries it follows that the judgments of their courts do not, by themselves, have force within the jurisdiction of other States.<sup>91</sup> This is of course commercially and judicially undesirable – private litigants have an interest in avoiding the costs and injustice of repeat litigation whilst States have a common interests in promoting international commerce. Thus, States have developed rules

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<sup>89</sup> *ibid* 124-126 (Bingham LJ, with whom Stocker LJ agreed).

<sup>90</sup> Brussel Recast, article 33.

<sup>91</sup> *Gage v Bulkeley* (1744) 27 ER 824, 824 (Lord Hardwicke): 'every sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority, and have a different sovereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act...'

regulating the recognition of foreign judgments to promote these interests without infringing sovereignty.

- 51 Today the obligation to recognise foreign judgments is primarily contained in European regulations or domestic legislation. But, it also exists at common law. The case law demonstrates that this obligation was originally based on comity.<sup>92</sup> The Court of Appeal noted in *Rubin v Eurofinance SA*:<sup>93</sup>

At first enforcement was founded on the doctrine of comity. Then Parke B. explained in *Williams v Jones* [1845] 13 M.W. 628 at 633: ‘where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.’ That appears to be the modern position.<sup>94</sup>

- 52 The case law appears to suggest that comity is no longer the basis for the recognition of foreign judgments at common law.<sup>95</sup> However, these cases, starting with the decision in *Williams*, suggest that comity was cast aside because it was thought to entail nothing more than ‘mere courtesy’ towards foreign States. The courts of the time were concerned that ‘mere courtesy’ was simply not a strong enough basis upon which to ground an obligation to recognise foreign judgments.<sup>96</sup> Admittedly, if comity is considered to be nothing more than ‘mere courtesy’ then it is indeed relatively useless. But, as the Supreme Court noted only recently - comity is a term of ‘very elastic content’.<sup>97</sup> At its weakest, it may be used simply to denote courtesy toward foreign States. But, at its strongest, it is a powerful legal tool capable of shaping private international law rules and principles.<sup>98</sup> If one accepts the understanding of comity put forward in this article, there is little reason why it should not still be considered the basis for the obligation to recognise foreign judgments at common law.

- 53 Arguably, the ‘modern position’ is based on comity. The fundamental premise of the doctrine of sovereignty is that each State is obliged to respect the laws and acts of other States – including, the decisions of foreign courts over matters which they have competent jurisdiction. But the doctrine does not permit those laws and acts to have effect within the jurisdiction of other States. Thus, the force of a judgment is confined to the rendering State, and if there is to be enforcement domestically, it must first be recognised by converting it to a domestic judgment. At common law this is how it has always been - legal proceedings are bought on the basis of a foreign judgment, and if successful, a domestic judgment will be given and this is what may be enforced. In this sense it is true that a foreign judgment, of itself, may never

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<sup>92</sup> *Murthy v Sivasjothi* [1999] 1 WLR 467 (CA); *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2011] Ch 133; *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236.

<sup>93</sup> *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2011] Ch 133 (judgment was reversed on grounds unrelated to the Court of Appeal’s remarks on comity in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236).

<sup>94</sup> *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2011] Ch 133 [34]-[35] (Ward LJ).

<sup>95</sup> *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236.

<sup>96</sup> *Williams v Jones* [1845] 153 ER 262, 13 M&W 628; *Meyer v Ralli* (1876) 1 CPD 358; *Blohn v Dessler* [1962] 2 QB 116 (Ch) 123-124 (Diplock J); *Indyka v Indyka* [1969] 1 AC 33 (HL) 58 (Lord Reid); *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236.

<sup>97</sup> *Agbaje v Agbaje* [2010] UKSC 13, 1 AC 628 [51] (Collins SCJ, judgment of the Court).

<sup>98</sup> *ibid* [51]-[54] (Collins SCJ, judgment of the Court).

be enforced domestically.<sup>99</sup> What the courts have failed to note is that it is by virtue of comity that domestic courts recognise foreign judgments for the purpose of supporting these domestic judgments. In this sense, it is difficult to argue that comity is not the basis for the obligation to recognise foreign judgments at common law.

- 54 Of course, recognition carries with it the risk of infringing domestic sovereignty. Thus, the obligation to recognise foreign judgments is tempered by the counterpart obligation to protect domestic sovereign interests. Comity reconciles these interests by forming the basis for, and guiding the application of, the public policy exception. As demonstrated in section 5(5.1), where the recognition of a foreign judgment is relied upon to assert a domestic right, ‘considerations of comity... necessitate specific examples of [a breach of public policy] before any decision is made not to recognise the judgments of a foreign state.’<sup>100</sup> By favouring recognition, and by narrowing the scope of refusal, comity is able to reflect the judicial need to recognise foreign judgments and the political need to uphold sovereignty.

## 7. Judicial Cooperation

- 55 Comity plays a significant, but perhaps greatly undervalued role, in the area of judicial cooperation. In judicial cooperation cases, courts are increasingly turning to comity to determine whether they should request assistance, or accede to a request, from foreign courts. If a foreign court request judicial assistance, comity favours acceding to the request where the relief sought is capable of being granted under domestic law. By the same token, comity restricts courts from requesting assistance from foreign courts where they are aware that the foreign court has no power to make such an order.<sup>101</sup> Modern case law demonstrates a real willingness on behalf of domestic courts to assist foreign courts whenever possible and make requests to foreign courts when necessary.<sup>102</sup>
- 56 Whilst comity will be relevant in all cases of judicial cooperation it has become increasingly important in two types of cases. The first is where a foreign court requests a domestic court to make pre-trial discovery orders in support of foreign proceedings; and the second is where a

<sup>99</sup> A. BRIGGS, 354. *Hague Lectures* 2011, pp. 149-150.

<sup>100</sup> *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458 [151] (Rix LJ, judgment of the Court); Also see, *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 and *Al-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123, [2006] CP Rep 47.

<sup>101</sup> *Minnesota v Philip Morris Inc* [1998] ILPr 170 (CA); *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 (HL) 611 (Lord Wilberforce).

<sup>102</sup> Section 7 is primarily concerned with the role of comity where a domestic court has been requested to assist a foreign court. However, there is no shortage of cases where a domestic court has relied on comity to request assist from a foreign court. See most notably, *Von Mitchke-Collande v Kramer* [2005] EWHC 977 (QB) where the Court request assistance from the Swiss judiciary concerning an issue of Swiss law. Burton J held [2-3]: ‘The issues that require to be decided... are all matters of Swiss law. They are, it appears clear to me, matters which could be decided with considerable ease by a Swiss court, being short points of law and practice familiar to the Swiss courts, not involving any resolution of disputed fact, but they would cause great difficulty for an English court, even assisted by Swiss legal experts... In these modern days of comity, coupled with speedy communications, it is in my judgment far less satisfactory for an English judge to come lamely and haltingly to a conclusion, when the foreign court is ready, willing and able speedily to provide the answer... It is often the case in Letters of Request proceedings, for example, that recourse can be had to a speedy question posed to the foreign court, rather than for an attempt to be made at the answer by this court.’

domestic court has been requested to grant orders in support of foreign bankruptcy and insolvency proceedings. These cases are particularly interesting because they demonstrate how comity may be used in new, complex area of law to reconcile the disjunct between the judicial needs of modern international commerce and the sovereign needs of States which were formed in different era.

### ***7.1. Requests for Pre-Trial Discovery Orders***

57 Where a court is asked to grant an order for discovery in support of foreign proceedings, comity demands that the court approach the request positively and with intention to give it effect. Whilst courts may go no further than they are permitted by domestic law, they will read and shape letters of request with an aim to assist foreign courts. However, even so, differences in legal traditions often mean that courts will struggle to give effect to certain requests because to do so will offend domestic sovereignty.<sup>103</sup>

58 For example, in the case of *Philip Morris Incorporated*<sup>104</sup> the Court of Appeal held that it could not accede to a request by the District Court of Minnesota that witnesses attend to give evidence in the United States because the request sought to elicit general information – something not permitted under domestic law.<sup>105</sup> Woolf MR and Gibson LJ held respectively:

... the approach of this court and other courts in this jurisdiction will be to seek to assist a foreign court wherever it is appropriate. For that reason the courts will seek to give effect to a Letter of Request wherever this is practical. Comity between jurisdictions demands no different an approach.<sup>106</sup>

But the English court's natural inclination to give effect to the request must be tempered both by the requirements of the Act, which limit the jurisdiction of the English court to applications for an order for evidence (i.e. factual material required to prove or disprove allegations at trial), and by the proper concern of the English court that those within its jurisdiction who are called upon to give evidence will be fairly dealt with in the evidence gathering process, which the court may allow to be conducted here for the purposes of the foreign proceedings.<sup>107</sup>

59 Agreeing, Otton LJ delivered a separate judgment only to stress the importance of comity in these types of cases:

I wish only to endorse the sentiments of my Lord, the Master of the Rolls, concerning comity. In the interests of comity, the courts of each country should strive, and be seen to strive, to give effect to the request of the courts of the other... I have striven mightily to give effect to the request, but reluctantly, and for the reasons given, have been unable to do so... Given the width of the request, the formulation of a suitably worded limitation by this court is not, in my view, workable in the context of the proposed examinations. What is required is that the request should be redrafted in different terms.

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<sup>103</sup> See, most notably *Minnesota v Philip Morris Inc* [1998] ILPr 170 (CA) 13 (Woolf MR). Also see, *First American Corp v Zayed* [1999] 1 WLR 1154 (CA), *Re State of Norway's Application* [1987] 1 QB 433 (CA), *Re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331 (HL) and *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 (HL).

<sup>104</sup> *Minnesota v Philip Morris Inc* [1998] ILPr 170 (CA).

<sup>105</sup> *ibid* 56, 64 (Gibson LJ).

<sup>106</sup> *ibid* 17 (Woolf MR).

<sup>107</sup> *ibid* 55 (Gibson LJ). See also, *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 (HL) 611 (Lord Wilberforce) for similar comments.

However, my reluctance is tempered by the knowledge that the Honourable Kenneth J. Fitzpatrick [of the District Court of Minnesota] will readily understand the difficulties this court has faced.<sup>108</sup>

- 60 The Court noted that it refused the request with regret for it had no doubt the witnesses could give important evidence. But to accede to the request would be contrary to domestic law. Whilst the Court was ultimately unable to give effect to the request it provided guidance to the foreign court of the perceived defects in the request and invited it to submit a reformulated version it could give effect to.<sup>109</sup>

## ***7.2. Assistance in Bankruptcy and Insolvency Proceedings***

- 61 Comity has also become a leading principle where courts are asked to grant orders in support of foreign bankruptcy and insolvency proceedings. Whether assistance should be given ultimately depend on whether there is a judicial need for assistance and its effect on sovereignty.
- 62 There is no international unanimity on the details of bankruptcy and insolvency law. Rather, it generally reflects the domestic policy of individual States. The result is that there has been a trend towards the idea of ‘modified universalism’ – the idea that international insolvencies should be managed by a single court applying a single bankruptcy law.<sup>110</sup> When combined with the principle of comity courts often find themselves under an obligation to support foreign proceedings.
- 63 Early case law demonstrates comity’s role in this area was to ensure that courts would not interfere with foreign proceedings. In 1910 Lord Dunedin held:

Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the court finds that there is already pending a process of universal distribution of a bankrupt’s effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution...<sup>111</sup>

- 64 However, modern case law demonstrates that bankruptcy and insolvency issues simply cannot be resolved by the courts of one State to the exclusion of all others. Rather, there is a need for courts to actively assist one another - not just stay out of each other’s ways. English courts appear to have come to this realisation after the bankruptcies or liquidations of major international companies such as Bank of Credit and Commerce International, Maxwell Communications and Lehman Brothers, all of who had business, assets and creditors in different jurisdictions.<sup>112</sup>

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<sup>108</sup> *Minnesota v Philip Morris Inc* [1998] ILPr 170 (CA) 71-72 (Otton LJ).

<sup>109</sup> *ibid* 67-70 (Gibson LJ).

<sup>110</sup> *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 [15]-[16] (Collins SCJ, with whom Walker & Sumption SCJJ agreed); *Re HIH Casualty and Insurance Ltd* [2008] UKHL 21, 1 WLR 852 [19]-[21], [30] (Lord Hoffmann); *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [2015] AC 1675 [29] (Sumption SCJ). Also see, EU Regulation 2015/848 on insolvency proceedings.

<sup>111</sup> *Galbraith v Grimshaw* [1910] AC 508 (HL) 513 (Lord Dunedin).

<sup>112</sup> *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 [14] (Collins SCJ, with whom Walker & Sumption SCJJ agreed).

- 65 More recent case law demonstrates that courts perceive there to be a serious need for courts to actively support one another to ensure there is an international judicial regime in place to resolve these types of cases. These same cases demonstrate that comity now demands, not only that courts do not interfere with foreign proceedings, but that they also actively support them where possible.<sup>113</sup> For example, in the 2008 case of *HIH*,<sup>114</sup> Lord Hoffman held that ‘English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.’<sup>115</sup> In *HIH* English courts had been asked to make an order to direct remission of assets collected in England to Australia to support Australian proceedings. The question was whether the English courts should make such an order notwithstanding the difference between the English and Australian statutory regimes. Ultimately, the House of Lords held that the remission should take place.
- 66 The majority based its reasoning on the statutory power to assist foreign insolvency proceedings under section 426 of the *Insolvency Act 1986* with Lord Hoffmann and Walker holding that the power also exists at common law. Lord Hoffmann held that both the statutory and common law power must be interpreted in accordance with the principle of comity. The effect is that whilst courts retain discretion not to give assistance, that discretion is restricted by the dictates of comity.<sup>116</sup>
- 67 Comity’s role becomes more complex where the court is asked by one of the parties to exercise its judicial power in support of foreign proceedings, but that same power is not available to the foreign court. There are obvious judicial reasons why a court may wish to exercise its power in such circumstances. However, the question for courts in these types of cases will be – would the exercise of their judicial power undermine or offend the sovereignty of the foreign State?
- 68 The most notable cases in this area is *Cuoghi*.<sup>117</sup> In that case the claimant bought proceedings in Switzerland against the defendant who resided in England alleging that he had conspired to misappropriate funds. It was conceded in ancillary English proceedings that there was a good arguable case against the defendant which would have justified a world-wide asset freezing order had the case been bought in England. The difficulty was that whilst the Swiss courts had power to grant such an order against a person residing in Switzerland, they did not in respect of the defendant because he resided in England. The question for the English court was whether it should restrain the defendant from disposing of assets in support of the Swiss proceedings where the Swiss court did not possess the same power.

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<sup>113</sup> *ibid* [29] (Collins SCJ, with whom Walker & Sumption SCJJ agreed); *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [2015] AC 1675 [23] (Sumption SCJ).

<sup>114</sup> *Re HIH Casualty and Insurance Ltd* [2008] UKHL 21, 1 WLR 852. See also, *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, [2007] 1 AC 508 (PC) and *England v Smith* [2001] Ch 419 (CA).

<sup>115</sup> *Re HIH Casualty and Insurance Ltd* [2008] UKHL 21, 1 WLR 852 [30] (Lord Hoffmann).

<sup>116</sup> *ibid*; *Hughes v Hannover Rückversicherungs AG* [1997] BCC 921 (CA); *England v Smith* [2001] Ch 419 (CA).

<sup>117</sup> *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA).

- 69 Ultimately, the English court held that comity favoured exercise of the power on the basis that there were significant judicial reasons to do so and it would not offend Swiss sovereignty. Millett LJ held:

It is a strong thing to restrain a defendant who is not resident within the jurisdiction from disposing of assets outside the jurisdiction. But where the defendant is domiciled within the jurisdiction such an order cannot be regarded as exorbitant...

Where a defendant and his assets are located outside the jurisdiction of the court seized of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders in personam, including orders for disclosure, this means the courts of the state where the person enjoined resides.

I recognise that an ancillary jurisdiction ought to be exercised with caution, and that care should be taken not to make orders which conflict with those of the court seized with substantive proceedings. But I do not accept that interim relief should be limited to that which would be available in the court trying the substantive dispute... By going further than the Swiss courts were prepared to go in relation to a defendant resident outside Switzerland, we would not be seeking to remedy any perceived deficiency in Swiss law, but rather to supplement the jurisdiction of the Swiss courts...

It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.<sup>118</sup>

- 70 Bingham LJ added that the order was appropriate because it did not seek to assert jurisdiction over any person outside the jurisdiction of the English Courts and promoted an objective which might reasonably be assumed to find favour with the Swiss Court.<sup>119</sup>

- 71 This case has been met with mixed reactions. Some argue that if Swiss law precludes the exercise of such power then it is absurd to suggest that an English Court could view its actions as assisting the Swiss Court.<sup>120</sup> However, in our opinion the decision should be considered a particularly intelligent use of comity. The compartmentalisation of law and regulatory power, by virtue of the doctrine of sovereignty, means that it will generally be considered an exorbitant exercise of judicial power where courts seek to assert jurisdiction over assets or persons located in foreign States. However, the reality of modern international commerce requires that, in certain cases, these assets or persons be within reach of the court. The problem is that there is a disconnect between modern international commerce and the traditional conception of sovereignty. In *Cuoghi*, the Court held that this disconnect may be reconciled if courts in the State where assets or persons are located are prepared to grant protective measures in support of foreign proceedings. As the Court noted, it was not seeking to remedy any perceived deficiency in Swiss law, which would of course be offensive to Swiss sovereignty. Rather, it

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<sup>118</sup> *ibid* 827 (Millett LJ, with whom Bingham CJ & Potter LJ agreed); See also, *United States of America v Abacha* [2014] EWCA Civ 1291, [2015] 1 WLR 1917 which adopted the reasoning of Millett LJ in *Cuoghi*.

<sup>119</sup> *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA) 832 (Bingham CJ).

<sup>120</sup> A. BRIGGS, 354. *Hague Lectures* 2011, p. 170: '[W]hen I explained this judgment to a meeting of Swiss lawyers in Zurich several years ago, they were generally astonished, and not in a happy way, by the suggestion that an English court, intervening to grant relief which Swiss law (presumably deliberately) declines to make available, was to be seen as something which would "assist" the Swiss Courts.'



was seeking to use comity as a legal tool to supplement Swiss jurisdiction and support the proper conclusion of the foreign proceedings. In this sense, comity permitted the two jurisdictions to effectively merge for the purpose of resolving a modern international dispute that would have, in the past, slipped between the two.

- 72 A similar decision was reached in *Refco*<sup>121</sup> where the Court of Appeal granted Mareva relief in respect of assets in England to support foreign proceedings.<sup>122</sup> Of particular note again is the judgment of Millet LJ who held that, in these types of cases, comity is able to effectively bridge the gap between the judicial needs of modern international commerce and the sovereign needs of States which were formed in a different era:

The jurisdiction of national courts is primarily territorial, being ordinarily dependent on the presence of persons or assets within their jurisdiction. Commercial necessity resulting from the increasing globalisation of trade has encouraged the adoption of measures to enable national Courts to provide assistance to one another, thereby overcoming difficulties occasioned by the territorial limits of their respective jurisdictions.

Comity involves respect for the foreign courts' jurisdiction and process... A court which is invited to exercise its ancillary jurisdiction to provide assistance to the court seized of the substantive proceedings need feel no reluctance in supplying a want of territorial jurisdiction but for which the other court would have acted. But it should be very slow to grant relief which the primary Court would not have granted even against persons present within its own jurisdiction and having assets there.<sup>123</sup>

- 73 In both *Cuoghi* and *Refco* Millet LJ's understanding of comity allowed him to surmount the difficulties posed by the doctrine of sovereignty without infringing its traditional conception.<sup>124</sup> In *Motorola Credit Corp*<sup>125</sup> the Court of Appeal noted that these types of cases lay 'at the creative edge of a divide between comity and exorbitancy'.<sup>126</sup> Ultimately, it is for the courts to determine whether the exercise of judicial power in these types of cases will be considered exorbitant. But, the case law suggests that an informed understanding of comity may provide courts with the tools they need to appropriately exercise their power in difficult cases.
- 74 Inside the European Union, insolvency proceedings are largely governed by EU Regulation 2015/848 (**Insolvency Regulation**). Article 52 relevantly provides that:

Where the court of a Member State [where the main proceedings are on-foot] appoints a temporary administrator in order to ensure the preservation of a debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that Member State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

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<sup>121</sup> *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159 (CA).

<sup>122</sup> *ibid* 174 (Potter LJ).

<sup>123</sup> *ibid* 175 (Millet LJ).

<sup>124</sup> See also, *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [2015] AC 1675 [25] (Sumption SCJ): '[T]here is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up... It exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers...'

<sup>125</sup> *Motorola Credit Corp v Uzan & Ors* [2003] EWCA Civ 752, [2004] 1 WLR 113.

<sup>126</sup> *ibid* [53] (Potter LJ, with whom Thorpe & Tuckey LJ agreed).

- 75 Whilst Article 52 places no obligation upon English courts to accede to such requests, considerations of comity suggest that they ought to approach any request for assistance positively and with a view to giving it effect. Of course, English courts may go no further than they are permitted under domestic law. However, the inclusion of Article 52 suggests that Member States may see the benefit of orders such as those contemplated in *Cuoghi* and *Refco* and that considerations of comity ought not to preclude English courts from granting such orders in the future.

## 8. Conclusion

- 76 Lord Collins, speaking from extensive experience at the Bench, has noted that in practice comity continues to play an important role in the resolution of private international law disputes.<sup>127</sup> In his words, the importance attributed to comity by the judiciary makes the principle ‘worthy of further academic research’ in its own right. However, his Lordship has also warned that if comity is to be of any real use then the case law requires synthesis.<sup>128</sup> This article has sought to answer that call. By synthesising the case law, and removing some of the confusion surrounding the concept, this article has sought to unbridle comity’s legal potential and reposition it as an important principle of English private international law worthy of further academic research.

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<sup>127</sup> L. COLLINS in J. FAWCETT, *Reform and Development of Private International Law*. See also, A. BRIGGS, 354. *Hague Lectures* 2011.

<sup>128</sup> L. COLLINS in J. FAWCETT, *Reform and Development of Private International Law*, p. 110.